

[2025] FWC 742 [Note: a [correction](#) has been issued to this document - An appeal pursuant to s.604 (C2025/2654) was lodged against this decision. - This decision has been quashed - refer to Full Bench decision dated 18 September 2025 [[\[2025\] FWCFB 212](#)]]



## DECISION

*Fair Work  
Act 2009*

s.365—General protections

**Yuri Humeniuk**

**v**

**Sculpture By The Sea Incorporated**  
(C2024/6798)

COMMISSIONER SLOAN

SYDNEY, 14 MARCH 2025

*Application to deal with contraventions involving dismissal*

[1] Yuri Humeniuk is an art installer. Between 2004 and 2024, he performed work for Sculpture by the Sea Incorporated (“SXS”).<sup>1</sup> That work included the installation and de-installation of sculptures and artworks at exhibitions produced by SXS, such as the Sculpture by the Sea exhibitions at Bondi, New South Wales (“Bondi Exhibition”) and Cottesloe, Western Australia (“Cottesloe Exhibition”).

[2] Mr Humeniuk was injured at work in January 2024. This led to him raising a number of concerns about safety in SXS’s operations, and SXS’s compliance with its obligations under work health and safety and workers compensation legislation.

[3] On 3 September 2024, SXS informed Mr Humeniuk that he would not be working on the 2024 Bondi Exhibition. He claims that this amounted to a dismissal from his employment with SXS.

[4] On 24 September 2024, Mr Humeniuk commenced proceedings under s 365 of the *Fair Work Act 2009*. He alleged that in raising his concerns he was exercising a workplace right<sup>2</sup>; that he was dismissed as a result of doing so; and that this constituted adverse action<sup>3</sup> in contravention of s 340.

[5] SXS denies that it dismissed Mr Humeniuk. On that basis, it has raised a jurisdictional objection to the Commission dealing with the matter.

### Determination

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<sup>1</sup> Mr Humeniuk first commenced working for Bathtubs Productions Pty Ltd which traded as "Sculpture by the Sea". From 2011 he worked for Sculpture by the Sea Incorporated. For convenience, and where the context allows it, a reference to SXS includes Bathtubs Productions.

<sup>2</sup> Within the meaning of s 341

<sup>3</sup> Within the meaning of s 342

[6] I have determined that SXS did not dismiss Mr Humeniuk. I uphold SXS’s objection. These are my reasons.

### Relevant law and principles

[7] Section 365 provides that if a person “has been dismissed” and they, or an industrial association on their behalf, allege that the dismissal contravened Part 3-1 of the Act, they may apply to the Commission to deal with the dispute.

[8] Section 368 requires the Commission to “deal with” a dismissal dispute “other than by arbitration”. That is, by mediation or conciliation, or by making a recommendation or expressing an opinion.<sup>4</sup> Section 368(3)(a) provides that if the Commission is satisfied that all reasonable attempts to resolve the dispute (other than by arbitration) have been, or are likely to be, unsuccessful, then the Commission must issue a certificate to that effect. Once such a certificate has been issued, the applicant is entitled to make a general protections court application, unless the parties agree to the Commission arbitrating the dispute under s 369.

[9] It is an essential precondition to the Commission’s authority to perform its functions under s 368 that the application is properly made under s 365.<sup>5</sup> If a respondent asserts that there has been no dismissal, it gives rise to an antecedent dispute going to the entitlement of the applicant to make the application that must be resolved before the powers conferred by s 368 can be exercised at all.<sup>6</sup>

[10] The Act defines “dismissed” in s 386(1). That section contemplates two scenarios.

[11] First, a person will be have been dismissed if their employment was terminated on the employer’s initiative: s 386(1)(a). A termination will be “on the employer’s initiative” if it is brought about by the employer without the employee’s agreement. The question is whether an action on the part of the employer was the principal contributing factor which resulted, directly or consequentially, in the termination of the employment.<sup>7</sup>

[12] Whether a person was dismissed within the meaning of s 386(1)(a) involves a factual inquiry by reference to the termination of the employment *relationship* (including, where necessary, the circumstances of the entire relationship) not by reference merely to the applicable employment *contract*.<sup>8</sup>

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<sup>4</sup> Statutory note to s 368(1), referencing s 595(2)

<sup>5</sup> *Coles Supply Chain Pty Ltd v Milford* (2020) 300 IR 146; [2020] FCAFC 152 at [51]

<sup>6</sup> *Coles Supply Chain Pty Ltd v Milford* (2020) 300 IR 146; [2020] FCAFC 152 at [67]. See also *Lipa Pharmaceuticals Ltd v Mariam Jarouche* (2023) 324 IR 375; [2023] FWCFB 101 at [4].

<sup>7</sup> *Saeid Khayam v Navitas English Pty Ltd* [2017] FWCFB 5162 at [75], citing *Mohazab v Dick Smith Electronics Pty Ltd (No 2)* (1995) 62 IR 200

<sup>8</sup> *Alouani-Roby v National Rugby League Ltd* [2024] FCA 12 at [54]; *Saeid Khayam v Navitas English Pty Ltd* [2017] FWCFB 5162 at [75]

[13] Second, a person will have been dismissed where they resigned from their employment, but were forced to do so because of conduct, or a course of conduct, engaged in by their employer: s 386(1)(b). This reflects the common law concept of constructive dismissal.<sup>9</sup>

[14] In this case, there is no suggestion that Mr Humeniuk resigned, whether as a result of being forced to do so or otherwise. Accordingly, there is no need to traverse the principles that would apply to a consideration of whether a dismissal under s 386(1)(b) had occurred.

### **Factual context**

[15] Over the years, Mr Humeniuk worked for SXS as both an employee and independent contractor, under a variety of contracts and arrangements. SXS engaged him on a regular and consistent basis. For instance, Mr Humeniuk worked on the Bondi Exhibition in every year from 2004 to 2023, apart from 2020 and 2021 when it was cancelled due to COVID. He also worked on all but two of the Cottesloe Exhibitions.

[16] Mr Humeniuk was (and is) well regarded. In 2018 he was described as SXS's "preferred contractor" for the installation and de-installation of sculptures.<sup>10</sup>

[17] As at 15 January 2024, Mr Humeniuk was working for SXS as an independent contractor. On that day, he was injured at work at SXS's "Kingswood depot" ("Incident"). He was hospitalised and had to undergo surgery to his face.

[18] A question arose as to whether, as an independent contractor, Mr Humeniuk was covered by SXS's workers compensation insurance. This appears to have prompted SXS to offer Mr Humeniuk employment on a casual basis as a Senior Sculpture Installer under an employment contract dated 19 January 2024 ("Employment Contract"). Mr Humeniuk signed the Employment Contract on 20 January 2024.

[19] Following the Incident, Mr Humeniuk discussed with various people at SXS his concerns about the safety of the Kingswood depot. These were consistent with concerns that he had raised previously with SXS. The people he spoke to included David Handley, the CEO and a director of SXS, Davina Corti, SXS's Company Manager and Trent Marwick, SXS's Site & Logistics Advisor.

[20] On 12 March 2024, Ms Corti sent an email to Mr Humeniuk that addressed a range of matters.<sup>11</sup> These included a description of the attempts by SXS to find an alternative storage space to the Kingswood depot and of the changes that it had introduced to its work safety policies following the Incident. Ms Corti referred to concerns that Mr Humeniuk had raised "about the management of Kingswood by other senior SXSINC staff and contractors and their work practices" and suggested that a meeting be convened so that he could explain his concerns in full. The email included the following statement:

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<sup>9</sup> Explanatory Memorandum for the *Fair Work Bill* at par 1530; *City of Sydney RSL & Community Club Limited v Roxana Balgowan* [2018] FWCFB 5 at [9] and [13]

<sup>10</sup> Statement of Yuri Humeniuk, 9 December 2024, Annexure F

<sup>11</sup> Statement of Yuri Humeniuk, 9 December 2024, Annexure H

“You are important to Sculpture by the Sea and have been an integral part of our organisation since its early years. Your injury has rocked all of us.”

[21] Mr Humeniuk responded to Ms Corti in an email sent on 25 March 2024.<sup>12</sup> In his email, Mr Humeniuk canvassed a range of subjects, including:

- 1) his dissatisfaction with SXS’s response to the Incident and what he considered to be its lack of action, particularly in light of the safety concerns regarding the Kingswood depot that he had raised prior to the Incident. This included SXS’s failure to report the Incident to SafeWork NSW;
- 2) his concerns regarding the “shortfalls” of the Kingswood depot. Mr Humeniuk described the site as not being suitable for the works being conducted. He stated that these issues had been an ongoing problem for years. He called into question the veracity of information that SXS had provided to him to the effect that following the Incident it had started a search for an alternative location;
- 3) his criticisms of the changes that SXS had introduced to its safety policies and on-site procedures, describing them as revealing “a fundamental misunderstanding of how risk management works”;
- 4) his concerns as to whether he was covered by SXS’s workers compensation insurance; and
- 5) other grievances, including how he felt that he had been treated by several individuals following the Incident.

[22] Mr Humeniuk’s email included the following:

“Having worked for SXS for twenty years, every Bondi event, all but two Cottesloe events, every international exhibition and every other project SXS has undertaken, it would be an understatement to say I am not invested in the idea, the staff and the artists. I am open to and in fact demand that these conversations take place. It is unfortunate that it has taken a workplace accident to bring these issues to the forefront of peoples minds. It is also the reason I am writing this email as I have voiced concerns verbally, for what seems like forever.

...

I acknowledge that both of you are upset by the injury and subsequent events. I however believe I am justified in wanting something other than a chat, coffee or dinner in response to what happened on January 15, I personally would like to get back to an easy trusting discourse with you Davina.

...

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<sup>12</sup> Statement of Yuri Humeniuk, 9 December 2024, Annexure H; Respondent’s Outline of Submissions – Jurisdictional Objection, Annexure B

I informed David Handley on the phone call Friday 22<sup>nd</sup> January that I will discharge all works I have agreed to to date so as not to disadvantage Trent and Justin on their respective projects. After this time I will assess working for SXS on a case by case basis. On the proviso that SXS comply with their legal requirements and make meaningful change toward a working environment beneficial to the artists creations and those individuals that organise and physically handle these artworks.

If you can advise when this process has commenced we can move on together towards another 20 years of Sculpture By the Sea.”

(Reproduced as per original)

[23] The language that Mr Humeniuk adopted in his email was at times intemperate. Its tone was confrontational. For example, in the email he expressed surprise that in her email of 12 March 2024, Ms Corti “signed [her] name to David’s words” and described Ms Corti’s email as being “an odd mixture of genuine concern and clunky legalese obfuscation”. In his evidence before me he stated that he “was feeling frustrated by the Company’s failure to engage with these ongoing safety issues”.<sup>13</sup> Be that as it may, the email set a tone which Mr Humeniuk was to maintain.

[24] Ms Corti responded to Mr Humeniuk’s email on the same day. In her email she stated in part:<sup>14</sup>

“Thank you for your detailed email that you sent to David, Andrew and me today. We greatly appreciate the detail listed in your email.

...

Thank you for informing us of the obligation to report your injury as none of our senior staff were aware of this obligation at the time of your injury...

Today we reported your injury to Safe Work NSW. They will decide in ten days whether they wish to make any further inquiries. The reference number is 2-227654. ...

Thank you for detailing your frustrations and concerns. You are and have been an incredible part of Sculpture by the Sea. Please allow us some time to respond as I am on leave but rest assured we have taken the short comings of Kingswood seriously for many years and as your email points out have delegated the responsibility for either improving Kingswood or seeking alternative options to our Site Managers. This has not been at all well managed by these people and David acknowledges in all but one case he could have pushed each Site Manager harder but he did actively follow up with all of them on numerous occasions. At present the opportunity to possibly move to Greater Sydney Parklands has been re-activated by David with their senior staff and Chair, an opportunity that was let slip by Josh despite David very regularly following up with him over five or so months before he resigned.

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<sup>13</sup> Statement of Yuri Humeniuk, 9 December 2024, par 37

<sup>14</sup> Statement of Yuri Humeniuk, 9 December 2024, Annexure H; Respondent’s Outline of Submissions – Jurisdictional Objection, Annexure C

...

We look forward to replying in more detail and to meeting with you in the near future.”

(Reproduced as per original)

[25] Mr Humeniuk sent an email to Ms Corti in reply on 26 March 2024. I will not traverse all of the detail. It included the following:<sup>15</sup>

“Thank you for acknowledging that you have known about the ‘short comings’ of Kingswood for many years. As you are well aware, I have seen many people go through the roll of site manager for the last 20 years. I count some of them as the most amazing people I have ever met, those, the first category, are still some of my closest friends to this day. The other category is populated with the wildly unsuited, lecherous, lazy or incompetent. Neither of these categories will produce better results from being ‘pushed harder’ by David Handley. The first is doing their absolute best, the second should never been hired in the first place. (Some, let’s call him the lazy and lecherous, have been hired a second time, against the council of those that had to work with him the first time).

I reiterate that I do not accept that it is the fault of the site managers assigned to seek alternate arrangements for Kingswood for the failure of this task. Those in the first category needed support and resources to achieve the desired result. Those in the second are the responsibility of those that hired them.

...

In my phone call Friday 22nd march David confirmed, somewhat angrily, that he had a hand in drafting your email 12 March, and went on, when challenged, to defend the notion that a phone call is a perfectly valid way to instruct a junior member of staff to seek an alternate depot. The idea that the call never took place was not raised. So in writing on the 12th March and verbally on the 22nd March, the implication and subsequently the insistence is, that Angela somehow failed to act on a verbal request to commence the search for a new ‘suitable space’. Upon receiving my email 25 March, faced with the demonstrably false existence of a phone call and Angela’s succinct summation of the intent of its assertion, the existence or otherwise of the call is now ‘irrespective’. And, if it did occur, counter to your email 12 March and my Discussion with David 22nd March no blame was implied. ...

And so in some ways it is relevant as it is archetypal example of the blame culture, gaslighting and justifiable denial that plague some elements of the SXS work culture, which, has led us to where we find ourselves today.”

(Reproduced as per original)

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<sup>15</sup> Statement of Yuri Humeniuk, 9 December 2024, Annexure I

[26] On 4 June 2024, Mr Humeniuk received an email from Trent Marwick inviting him to attend a meeting in advance of the 2024 Bondi Exhibition. The following day, Mr Humeniuk sent an email to Mr Marwick which stated in part:<sup>16</sup>

“I have still not received any thing from David or Davina regarding what SXS is doing, or planning to do, regarding the issues raised pertaining to safety and suitability of the Kingswood depot. Nor any response to the issue of organisational culture and decision-making processes that compound of these logistical shortcomings.

If SXS is unwilling to even talk with me about these critical issues I can see no reason to be involved in an engineering review. My input cannot be valued at one part of this process and ignored or avoided in the wider operational setting.”

(Reproduced as per original).

[27] On 7 June 2024, Ms Corti sent a further email to Mr Humeniuk. In large part, Ms Corti’s email was directed to explaining to Mr Humeniuk legal advice that SXS had received to the effect that at the time of the Incident, he was covered by SXS’s workers compensation policy, and the steps that SXS intended to take as a result. More relevantly for present purposes, Ms Corti made the following statement:<sup>17</sup>

“We will await the outcome of a workers compensation claim you may make, and then we would like to meet to talk through issues that you have raised. We suggest we engage a facilitator at our cost to assist us in finding a way forward.”

[28] Mr Humeniuk did not respond to that email.

[29] Ms Corti sent an email to Mr Humeniuk on 5 July 2024. It noted that Mr Humeniuk had informed Andrew Williams of SXS on 17 June 2024 that he did not wish to lodge a workers compensation claim. The email included the statement: “I hope that we can find a way back to an easy, trusting discourse.”<sup>18</sup> Mr Humeniuk did not respond to that email.

[30] Mr Humeniuk also did not respond to emails that Ms Corti sent him on 5 July 2024, 26 July 2024 and 19 August 2024.

[31] In the meantime, on 30 July 2024, Mr Marwick sent an email to Mr Humeniuk with the subject “SXS Bondi 2024 – Dates”. The email stated in part:

“Nick and I would greatly appreciate your skill set and experience on-site as either a casual employee or contractor for whatever of the below dates you may be available for the install and de-install periods.

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<sup>16</sup> Statement of Yuri Humeniuk, 9 December 2024, Annexure J

<sup>17</sup> Statement of Yuri Humeniuk, 9 December 2024, Annexure I; Respondent’s Outline of Submissions – Jurisdictional Objection, Annexure D

<sup>18</sup> Statement of Yuri Humeniuk, 9 December 2024, Annexure I

Thought best to get some dates to you now considering your availability is undoubtedly in-demand.

...

Once you've had some time to look into your schedule, would be great to lock in any availability."

(Reproduced as per original)

**[32]** Mr Humeniuk gave evidence that he had a conversation with Mr Marwick on about the same day in which he told Mr Marwick that he would work for SXS on the dates set out in the email. He said that he rearranged other commitments in order to be able to work on the 2024 Bondi Exhibition.

**[33]** On 3 September 2024, Ms Corti sent an email to Mr Humeniuk which stated in part:<sup>19</sup>

"I hope this email finds you well.

I am writing in regard to my email of 7 June and your subsequent conversations with Andrew Williams and me in which you said you did not want to lodge a workers compensation claim. ...

My email of 7 June mentions our offer that we engage a facilitator at our cost to talk through issues that you have raised to assist us in finding a way forward to work together. We believe this process will be beneficial for all of us and will hopefully result in all of us wanting to work together again, and from there to re-build our relationships. To give you confidence in the process we will be happy to pay for your time to meet a highly regarded facilitator to ensure you are happy with the person and the process before any meeting with us. We suggest that those to participate in one on one meetings with you and the facilitator, and or a group meeting, are Wayne Middleton, Phil Spelman, David Handley and myself. Please suggest anyone else you would like to include. If you do not think this is the best way forward please let us know now or in the future if or how you would like to meet.

Acknowledging your concerns about working with us again, and that you may not want to do so, and as we are in the final stages of preparing for this year's Bondi exhibition and unfortunately no longer have time to meet with you prior to commencing final preparations for the install of the exhibition, we would like to take a pause on our working relationship until after this year's Bondi exhibition. We suggest having a meeting in either mid-December or mid-January if you wish and are available, or any mutually convenient time later. Hopefully after these meetings we will all be happy to work together again."

(Reproduced as per the original)

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<sup>19</sup> Statement of Yuri Humeniuk, 9 December 2024, Annexure I; Respondent's Outline of Submissions – Jurisdictional Objection, Annexure F

[34] In an email to Ms Corti of 4 September 2024, Mr Humeniuk acknowledged that his services were not required for the 2024 Bondi Exhibition. He asked whether Ms Corti had informed SXS team members and artists of the decision.

[35] On 10 September 2024, Ms Corti sent Mr Humeniuk an email in reply which stated in part:

“We have been waiting for you to get back to us since my email of 7 June and have been hoping to meet with you to discuss our respective concerns, including those concerns you listed in your email of 25 March that you said needed to be addressed before you would work with us again. Accordingly, we have not told anyone apart from Trent and Nick Hill anything in relation to you and whether you might be working on the Bondi exhibition. As we finalise the crew for the exhibition we will start to let senior crew know who else is working on this exhibition. As a general rule, we do not tell artists who is on our site crew from one exhibition to the next.”

(Reproduced as per the original)

[36] Mr Humeniuk did not respond to that email.

[37] Throughout 2024, Mr Humeniuk had continued to work as a casual employee of SXS. This included working on the Cottesloe Exhibition in February and March 2024, the Snowy Valley Sculpture Train in New South Wales in April 2024, and other engagements in June and July 2024.

### **The positions of the parties**

[38] The controversy between the parties centres on whether Ms Corti’s email to Mr Humeniuk of 3 September 2024, putting a “pause” on the relationship until after the 2024 Bondi Exhibition, amounted to his dismissal from SXS.

[39] SXS submitted that its decision to not roster Mr Humeniuk to work the 2024 Bondi Exhibition did not terminate the employment relationship between the parties. Rather, it contended that:

- 1) the decision was consistent with the casual employment relationship reflected in the Employment Contract. Under the terms of that contract, SXS had no legal or contractual obligation to roster Mr Humeniuk to work the 2024 Bondi Exhibition;
- 2) it had made consistent efforts to maintain the employment relationship between 25 March 2024 and 10 September 2024. In particular, it had made several offers to engage in facilitated discussions with Mr Humeniuk to find a way to move forward with their working relationship. This included Ms Corti’s email to Mr Humeniuk of 10 September 2024, after Mr Humeniuk says that he had been dismissed; and
- 3) Mr Humeniuk remains employed by SXS as a Senior Sculpture Installer on a casual basis under the Employment Contract.

[40] Mr Humeniuk submitted that SXS’s decision to remove him from the 2024 Bondi Exhibition “directly or consequentially” resulted in the termination of his employment. His submissions included the following:

- 1) SXS cannot rely solely on the terms of the Employment Contract. Having regard to the totality of the employment relationship over 20 years, the terms on which SXS engaged Mr Humeniuk were partly in writing, partly oral and partly to be inferred from the parties’ conduct;
- 2) even though Mr Humeniuk was engaged on a casual basis, his employment was regular and systematic. In particular, he had been offered work on the Bondi Exhibition in every year of his employment in which it had been staged. His engagements were predictable and consistent from 2004 until September 2024;
- 3) SXS’s decision of 3 September 2024 was not a refusal to offer work; it was a withdrawal of work which Mr Marwick had offered Mr Humeniuk in July 2024 and which he had accepted. This distinction was “crucial” considering the arrangements which had been in place between the parties for 20 years;
- 4) the removal of Mr Humeniuk from the 2024 Bondi Exhibition was a fundamental departure from the relationship that existed between the parties for 20 years. It signified to Mr Humeniuk that SXS no longer required his services. This was supported by Mr Humeniuk’s evidence that he had not been offered work since he received the email of 3 September 2024 and that he had missed out on other work which would previously have been offered to him in that period;
- 5) SXS’s reliance on its offer to “mediate” with Mr Humeniuk about his safety concerns was disingenuous. The safety issues that Mr Humeniuk raised are not matters which could be “mediated”. It is an employer’s obligation to ensure that it provides a safe workplace for its employees, which exists irrespective of any views or input which may be provided by an employee; and
- 6) the reference in Ms Corti’s email of 10 September 2024 to wanting to address Mr Humeniuk’s concerns “before [he] would work with [SXS] again” was self-serving. Despite the concerns that Mr Humeniuk had raised following the Incident, he had continued to perform work for SXS up until July 2024. His concerns had not precluded him from confirming to Mr Marwick that he was available to work on the 2024 Bondi Exhibition.

### **Consideration**

[41] The parties’ positions can be distilled into several broad areas of controversy. I will address them in turn.

*The terms of the relationship to be derived from its history*

[42] Mr Humeniuk had a 20 year relationship with SXS. It was suggested during the hearing that he had at all times been engaged as a casual employee, although the evidence suggested

that there was some fluidity in the way in which the parties described their relationship and the terms that applied from time to time. Nothing turns on that for present purposes.

[43] In part, Mr Humeniuk's arguments may be summarised as follows: The Bondi Exhibition was a key event underpinning his relationship with SXS. For someone with his expertise, it was an event which delivered significant professional and personal rewards. He had an expectation (if not entitlement) to be rostered to work on the Bondi Exhibition. This was to be derived, at least in part, from the predictability and consistency with which he had been so rostered since he began working with SXS. He had agreed with Mr Marwick to work on the 2024 edition. For SXS to displace that agreement and to act inconsistently with its conduct over the previous 20 years represented such a fundamental departure from the terms of the relationship as to amount to a termination of that relationship. SXS's reliance on the terms of the Employment Contract does not avoid that conclusion.

[44] To some degree, Mr Humeniuk would have the Commission disregard the Employment Contract. I will not do so. It reflects the terms which the parties only recently had agreed would govern their relationship. It is relevant to a consideration of all the circumstances of the employment.

[45] To the extent that Mr Humeniuk's submissions are to be understood as suggesting that his expectation to be engaged to work on the Bondi Exhibition operated to the exclusion of the Employment Contract, I do not accept them. I note in particular that clause 1.5 of the Employment Contract provides that "there is no guarantee of ongoing or regular work" and that Mr Humeniuk was "entitled to accept or reject work that is offered to [him]".<sup>20</sup> That clause reflected the way in which the parties had conducted themselves during the relationship. That is, Mr Humeniuk exercised the right to refuse work. He gave evidence that he had elected not to work on the 2014 Cottesloe Exhibition because he was "opposed to the show being sponsored by Roy Hill mining", and did not work on the 2021 Cottesloe Exhibition because he would have been required to quarantine due to the COVID-19 pandemic and SXS "was not willing to pay for that period".<sup>21</sup>

[46] That said, I accept that there was an understanding reached between Mr Humeniuk and Mr Marwick in late July 2024 that Mr Humeniuk would work on the 2024 Bondi Exhibition. Mr Humeniuk's evidence that he had reached such an agreement with Mr Marwick was not challenged. But the evidence falls short of establishing an enforceable contract between the parties that Mr Humeniuk would work on the 2024 Bondi Exhibition.

[47] Under cross-examination, Ms Corti accepted that SXS would begin giving thought to who would be working on the exhibition, and the make-up of the crew, "several months out".<sup>22</sup> She also accepted that Mr Marwick's email to Mr Humeniuk of 30 July 2024 was to be read as Mr Marwick stating that he wanted Mr Humeniuk to be part of the crew, subject to his availability. However, Ms Corti's evidence also suggested that Mr Marwick was not in a position to finalise a contract with Mr Humeniuk.

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<sup>20</sup> Statement of Yuri Humeniuk, 9 December 2024, Annexure G

<sup>21</sup> Statement of Yuri Humeniuk, 9 December 2024, par 21

<sup>22</sup> Transcript 23 December 2024, PN132

[48] I also note that the reference in Mr Marwick’s email to Mr Humeniuk working “as either a casual employee or contractor” suggests that the basis on which Mr Humeniuk was to be engaged was still to be determined. There is no evidence that it ever was.

*Mr Humeniuk’s email of 25 March 2024*

[49] SXS placed significant reliance on Mr Humeniuk’s email to Ms Corti of 25 March 2024, and in particular his statement that he would “discharge all works” he had at that time agreed to do but thereafter “assess working for SXS on a case by case basis”. Ms Corti gave oral evidence that she understood from the email that Mr Humeniuk did not wish to work for SXS until it met with him to address his concerns.

[50] Mr Humeniuk gave evidence that he did not intend his email to mean that he would stop working for SXS altogether. He stated that he “continued to perform quite a bit of work for the Company after [he] sent that email”.<sup>23</sup> As noted above, there is no controversy that Mr Humeniuk did perform work for SXS between March and July 2024.

[51] However, Ms Corti gave evidence that prior Mr Humeniuk had agreed prior to 25 March 2024 to perform that work. To that extent, Mr Humeniuk was acting consistently with the position that Ms Corti understood him to have taken – that is, discharging all works that he had at that time agreed to do, but otherwise not being willing to work for SXS unless his concerns were addressed.

[52] In his submissions, Mr Humeniuk sought to downplay the significance of his email of 25 March 2024. He contended that “nothing turns on” the language of the email and that “it has no bearing on the ultimate question of what was the ultimate effect of the 3 September email and the decision that led to that email”.<sup>24</sup> I disagree. The email set in train the correspondence that I have describe above. That correspondence provides context within which the email of 3 September 2024 must be considered.

*SXS’s efforts to engage with Mr Humeniuk*

[53] There is nothing in Ms Corti’s emails to Mr Humeniuk referred to above to suggest that she had any interest beyond understanding and resolving Mr Humeniuk’s concerns, so as to maintain the employment relationship. Mr Humeniuk either rebuffed or ignored Ms Corti’s attempts to engage with him.

[54] It is significant that in her email of 12 March 2024, Ms Conti had proposed convening a meeting with Mr Humeniuk so that he could explain his concerns in full. She repeated this proposal in her email of 7 June 2024, adding the suggestion that the meeting involve a facilitator “to assist in finding a way forward”.

[55] Under cross-examination, Mr Humeniuk had the following exchange with SXS’s representative:

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<sup>23</sup> Statement of Yuri Humeniuk, 9 December 2024, par 38

<sup>24</sup> Transcript 23 December 2024, PN311

“And why did you not want to engage with Ms Corti to have that conversation and to address your concerns? Why did you not respond to her?---Because I had been trying to get a meeting with any of the executive at Sculpture by the Sea since, essentially, the 15 January. And so by the time those emails were coming in June/July, I’d already met with Davina in person and there’d been multiple occasions in between January and March where I had attempted to meet with anyone on the executive at Sculpture by the Sea to discuss my concerns. Those meetings were set up and then cancelled not by myself. So I didn’t perceive those email approaches to be genuine. I met with Davina in person at the Kingswood Depot in terrible conditions in July. So I’ve met on multiple occasions with many people at work and at no point had anyone attempted to set up a genuine meeting to that date. So I think by the time I’m getting emails in – you know – June/September – it’s, you know, the opportunity already passed for genuine mediation.”

**[56]** In her oral evidence, Ms Corti stated that she intended to meet with Mr Humeniuk when he was willing and able so that she could discuss working with him again and continuing the employment relationship. She said “I was trying to find a way forward. I’ve been trying to find a way forward”.<sup>25</sup>

**[57]** I have had the benefit of observing Ms Corti give evidence and have considered her email correspondence in light of those observations. I have no reason to consider that her attempts to set up a meeting with Mr Humeniuk were anything other than genuine. While there was a delay between Ms Corti’s email of 25 March 2024 and that of 7 June 2024, in the latter she explained and apologised to Mr Humeniuk for that delay.

**[58]** In the circumstances, I struggle to comprehend Mr Humeniuk’s failure to engage with Ms Corti to set up a meeting. In his email of 25 March 2024, he had stated that he was “open to and in fact demand[ed] that these conversations take place”. And yet when the opportunity arose to have those conversations, he ignored it.

**[59]** Mr Humeniuk also sought to diminish the significance of Ms Corti offering “mediation”, which I understood to be a reference to the offer of a facilitated conversation. The effect of his submissions was that SXS’s compliance with its work health and safety obligations was not conditional on mediation with employees. However, as Ms Corti stated under cross-examination, Mr Humeniuk’s concerns were not confined to safety matters. Rather, he also raised “cultural concerns in the organisation” and concerns with the “leadership culture”.<sup>26</sup> I accept that evidence. It reflects the terms of Mr Humeniuk’s emails to Ms Corti of 25 and 26 March 2024, and to Mr Marwick of 5 June 2024.

*The events leading to and including the 3 September 2024 email*

**[60]** There was a controversy between the parties as to whether the email of 3 September 2024 operated to “remove” Mr Humeniuk from the roster for the 2024 Bondi Exhibition.

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<sup>25</sup> Transcript 23 December 2024, PN179

<sup>26</sup> Transcript 23 December 2024, PN150

SXS contended as at 3 September 2024, the roster for the 2024 Bondi Exhibition had not been finalised. Mr Humeniuk could not, therefore, have been “removed” from it.

[61] Mr Humeniuk contended that whether or not the roster had been finalised, he and Mr Marwick had agreed on his participation. I have dealt with this earlier. Mr Humeniuk submitted that in her email of 3 September 2024, Ms Corti had “gone over the top of” Mr Marwick.<sup>27</sup>

[62] As I have said, there was an understanding between Mr Humeniuk and Mr Marwick that Mr Humeniuk would work on the 2024 Bondi Exhibition. However, for the reasons I have previously canvassed, to the extent Ms Corti went “over the top of” Mr Marwick, she was not displacing a binding contract under which Mr Humeniuk had been engaged to work on the 2024 Bondi Exhibition, or an enforceable commitment that SXS would enter into a contract with him to do so.

[63] But perhaps more to the point, whatever arrangement or understanding existed between Mr Humeniuk and Mr Marwick, it cannot be seen in isolation to the other events of 2024. As I have traversed, in March 2024 Mr Humeniuk raised a number of concerns regarding SXS’s compliance with its legal obligations, and its workplace and leadership culture. In his email of 25 March 2024, he used language to suggest that he was ambivalent about continuing to work for SXS unless and until the company addressed his concerns. And yet he chose not to engage with the company’s attempts to do so.

[64] In that context, Ms Corti’s decision to put a “pause” on the relationship was understandable and reasonable. She wanted clarity as to the status of the relationship from Mr Humeniuk’s perspective.

[65] As to SXS’s perspective as to the status of the relationship, in my view the evidence is clear. Consistent with my earlier observations, I consider that throughout 2024 Ms Corti regarded the employment relationship as continuing and that she was genuinely seeking ways to resolve Mr Humeniuk’s concerns so as to maintain that relationship. Importantly, she stated that in sending her email of 3 September 2024 it was not her intention to terminate the relationship.

[66] That leads to an examination of the language of the email itself. Read properly and in its entirety, nothing in its terms evinces an intention to terminate the relationship. To the contrary, it is consistent with Ms Corti’s earlier emails in seeking to acknowledge Mr Humeniuk’s concerns, putting forward a constructive suggestion as to how those concerns might be addressed, and expressing a desire to maintain the employment relationship.

[67] I accept SXS’s submissions that Ms Corti’s email of 10 September 2024 is significant in this regard. It repeats SXS’s wish to meet with Mr Humeniuk in an effort to resolve his concerns. This is inconsistent with SXS considering the relationship to have been terminated a week earlier.

#### *Failure to offer work after 3 September 2024*

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<sup>27</sup> Transcript 23 December 2024, PN304

[68] Mr Humeniuk stated that SXS had not offered him any work after 3 September 2024. He described the work that he “normally” would have been provided at the end of the year.<sup>28</sup> He also referred to a Phil Price sculpture in Batlow, New South Wales that had been damaged in storms. He stated that he is the “only person in Australia that handles Phil Price’s works” and that “[n]ormally the Company would have called me to fix it, but this hasn't happened and the sculpture remains damaged”.<sup>29</sup>

[69] Mr Humeniuk submitted that this evidence supports the conclusion that he had been dismissed on 3 September 2024. I do not accept that submission. That is because there is no evidence that SXS had work that could, much less should, have been offered to Mr Humeniuk during that period.

[70] I accept Ms Corti’s evidence that in the period after 3 September 2024 “[t]here hasn’t been any work to offer Yuri”.<sup>30</sup> In particular in relation to the damaged sculpture in Batlow, she accepted that in the ordinary course, and subject to the artist’s wishes, SXS would “definitely go back to Yuri”<sup>31</sup>. However, she stated that the work had not been offered to anyone, as SXS was concentrating on the Bondi Exhibition and had not been doing any work in the Snowy Valleys.

## Conclusion

[71] It is apparent that Mr Humeniuk feels a strong sense of grievance towards SXS. This is reflected in his emails to Ms Corti of 25 and 26 March 2024, and to Mr Marwick of 5 June 2025. This helps to explain why he did not consider the offer of a meeting set out in Ms Corti’s email of 7 June 2024 to be genuine and why he did not engage with it.

[72] However, a more dispassionate examination of Ms Corti’s emails leads to a different conclusion. SXS had (including at the date of the hearing) no intention to end its relationship with Mr Humeniuk. He was clearly a valued and highly regarded member of the team.

[73] At the same time, Mr Humeniuk had challenged SXS’s commitment to meeting its statutory obligations and its workplace and leadership culture in robust terms. He had indicated that he may choose not to work with SXS in the future if his concerns were not addressed. SXS sought to do exactly that, as it wished to continue the relationship. But in the face of Mr Humeniuk’s apparent refusal to engage in that dialogue from June 2024, SXS cannot be criticised for deciding not to offer Mr Humeniuk work on the 2024 Bondi Exhibition until the issues between them had been resolved.

[74] In that context, the “pause” in the relationship suggested by Ms Corti was exactly that. It was a decision consistent with the casual nature of the employment and the terms of the Employment Contract. It was not a decision to sever the relationship.

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<sup>28</sup> Statement of Yuri Humeniuk, 9 December 2024, par 52

<sup>29</sup> Statement of Yuri Humeniuk, 9 December 2024, par 52

<sup>30</sup> Transcript 23 December 2024, PN181

<sup>31</sup> Transcript 23 December 2024, PN186

[75] I find that the email of 3 September 2024 did not result, directly or consequentially, in the termination of the employment relationship. There was no termination at the initiative of the employer. As Mr Humeniuk did not suggest that he had been forced to resign, it follows that there was no dismissal.

[76] Consequently, I find that Mr Humeniuk was not entitled to bring a claim under s 365.

### **Order**

[77] The application is dismissed.



### COMMISSIONER

#### *Appearances:*

*Hai Van Nguyen*, for the Applicant  
*Emma Gillman*, for the Respondent

#### *Hearing details:*

23 December  
Sydney (by video)  
2024

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